SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

NUMBER [redacted] 191

EDWARD O. SAMS,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of Georgia

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Edward O. Sams petitions this Honorable Court for a Writ of Certiorari to review the judgment and opinion of the Court of Appeals of Georgia, entered in the above entitled case on January 9, 1970.

CITATION OF OPINION BELOW

The opinion of the Court of Appeals of Georgia is officially reported in 121 Georgia Appeals 46, and is printed in Appendix "B" hereto. The Supreme Court of Georgia denied certiorari on March 5, 1970, and on March 26, 1970, denied a timely motion to reconsider.

both without opinion which have not and will not be reported officially or unofficially.

JURISDICTION

The judgment and opinion of the Georgia Court of Appeals was entered on January 9, 1970. (R. 216) A motion for rehearing was denied on January 23, 1970. (R. 223) A timely Application for Writ of Certiorari was denied by the Supreme Court of Georgia, on March 5, 1970, as was a timely motion to reconsider on March 26, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. 1257.

QUESTION PRESENTED

May a search warrant issue within the scope of the Fourth Amendment to the Constitution of the United States, upon a conclusionary affidavit, the core of which is information furnished by an unnamed informer, where the magistrate is not furnished with any substantial reason to credit the informer's reliability, beyond the conclusion of the affiant-officer that the informer was reliable in the past?.

STATUTES INVOLVED

The question presented involves the Fourth Amendment of the Constitution of the United States and Article I, Paragraph XVI of the Constitution of Georgia of 1945, and Georgia Laws, 1966, pp. 567, 568, Georgia Code Annotated 27-303, all of which are printed in Appendix "A" hereto.

STATEMENT OF CASE

A search warrant was issued by a judge of the Fulton

County Criminal Court upon affidavit of an Atlanta police officer. (R. 201) The affidavit set forth certain information received from an unnamed informer (R. 201), observations of the police of known gamblers at the premises (R. 201); and a prior arrest record of Edward O. Sams, (R. 201) The affiant's conclusion that the informer had proven reliable in the past was set forth without elaboration. (R. 201)

The warrant was executed and certain items were seized. (R. 202)

A timely motion to suppress was filed. (R. 4) and after a hearing the trial court overruled that motion. (R. 7)

The applicant, Edward O. Sams, was tried on two counts (1) "betting or soliciting bets on athletic contests" and (2) "carrying on a lottery." (R. 3)

The applicant was found guilty on both counts (R. 8) and sentenced to one year and $1,000.00 fine on each count. (R. 9)

A timely appeal was made to the Court of Appeals of Georgia. (R. 1) That Court affirmed the trial court. (R. 216)

Application for Certiorari was made to the Supreme Court of Georgia and was denied on March 5, 1970. A motion to reconsider was denied on March 26, 1970.

EVIDENCE

The search warrant was issued upon an affidavit of one, W. W. Gable, an Atlanta police officer. (R. 201) This affidavit set forth certain information obtained by the affiant from an unnamed informer. (R. 201) The

affidavit contained the conclusion that the informer had proven reliable in the past (R. 201) without facts to substantiate the affiant's conclusion.

The affidavit stated that persons known to gamble on athletic contests had been observed coming and going from the premises and that Edward O. Sams had a prior record for similar activities. (R. 201)

Upon the trial of the issues, the State called only one witness, the officer who made the affidavit in question (R. 201), who made the search (R. 32), and, who made the arrest of Edward O. Sams. (R. 32)

This officer was qualified and did testify as an expert (R. 22) and as such, did testify that, in his opinion the items seized in the search were records of a "football lottery." (R. 39) He further testified as to the mode and method of conducting such a lottery. He testified that in his opinion a football lottery was being conducted in Fulton County, Georgia, on a day certain. (R. 39)

Under cross-examination this witness admitted that he could not swear that any bets were ever made (R. 60, 75), that any consideration had ever passed (R. 92), that the athletic contests upon which the bets were alleged to have been made were, in fact, ever played. (R. 60, 82) It was only his opinion that there was a lottery. This witness had no personal knowledge of any activity of applicant relating to the offenses charged.

Upon this evidence, the applicant was found guilty and sentenced. (R. 8, 9)

MANNER QUESTION PRESENTED RAISED

The question presented was raised in the trial court by and through a motion to suppress (R. 4) which was denied after a hearing. (R. 7)

The ruling of the trial court denying the motion to suppress was enumerated as error (R. 206) on appeal to the Court of Appeals of Georgia, which affirmed the trial court (R. 216) and in applicant's application for certiorari to the Supreme Court of Georgia. (R. 225).

SUMMARY OF REASONS FOR GRANTING THE WRIT

The opinion of the Georgia Court of Appeals being in conflict with decisions of this and other courts and with the Constitution of the United States, specifically the Fourth Amendment, denies applicant of his rights guaranteed by the Constitution and creates confusion in the law.

The opinion below is contrary to and in conflict with the decisions of this most Honorable Court in *Spinelli v. United States*, 89 S.Ct. 584; *Aguilar v. Texas*, 84 S.Ct. 1509; *Agnello v. United States*, 269 U.S. 20, 46 S.Ct. 4; *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374; *Grau v. United States*, 53 S.Ct. 38; *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741; *Jones v. United States*, 362 U.S. 229, 80 S.Ct. 725, 78 A.L.R. 2d. 233, 4 L.Ed.2d. 697; *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d. 62; *McIlvaine v. Louisiana*, 379 U.S. 10, 85 S.Ct. 90, 13 L.Ed.2d. 23; *Riggan v. Virginia*, 384 U.S. 152, 86 S.Ct. 1378, 16 L.Ed.2d. 431, and is in conflict with the holdings of other federal courts in *United States v. Wood*, 270 F. Supp. 963; *United States v. Freeman*, 358 F.2d. 459; *United States ex rel DeNegris v. Menser*, 247 F. Supp. 826; *Schnitzler v. Follette, Warden*, 379 F.2d. 846; *United States v. Bozza*, 365 F.2d. 206, and *United States v. Vigo*, 413 F.2d. 691.

ARGUMENT OF REASONS FOR GRANTING THE WRIT

The affidavit upon which the instant search warrant issued sets forth nothing more than police suspicion and conclusions. It sets forth nothing upon which the magistrate could find probable cause when considered in light of the pronouncements of the courts as applied to the Fourth Amendment prohibition.

The allegations concerning observations of the police of known gamblers entering and leaving the place to be searched (R. 201) clearly is of no probative value, as is the allegation concerning a prior record of Edward O. Sams. This Court, in *Spinelli v. United States*, supra, said:

> "The allegation that Spinelli was 'known' to the affiant and to other federal and local law enforcement officers as a gambler and an associate of gamblers *is but a bald and unilluminating assertion of suspicion that is entitled to no weight.*" (Emphasis added.)

Thus, it becomes clear that the information furnished by the informer becomes the very core of the instant affidavit.

Mr. Justice Goldberg, speaking for the majority in *Aguilar v. Texas*, supra, said:

> "The purpose of the complaint, then, is to enable the appropriate magistrate . . . to determine whether the 'probable cause' required to support a warrant exists. The *Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion . . .*" (Emphasis added.)

If the magistrate is to find probable cause he must first have before him fact upon which he may base his conclusion. Where the informer is involved, the magistrate becomes the judge of the credibility of the witness and must be furnished facts upon which he can make a judgment.

If the affiant-officer determines the credibility, as here, the magistrate acts not as an independent buffer between the police and the people, but as a rubber stamp for the police.

The court in *United States ex rel. DeNegris v. Menser*, supra, very ably expressed this point when it said:

> "In this case, the information received from the reliable source is the core of the affidavit; the police observations could not by themselves stand as a basis for a finding of probable cause, whether taken individually or collectively. (Citations omitted.) The affidavit here is fundamentally no more than the bare statement that the police received information from a reliable source that pool selling was being carried on at petitioner's premises. It no where discloses how the informant came to his stated conclusion. On what facts was it based? Did he actually see the pool selling being carried on or the 'paraphernalia'? Did he hear it from another unmentioned source, or is his statement based on mere suspicion?
>
> "(W)hat the police say does not necessarily carry the day; 'probable cause' is in the keeping of the magistrate.' *United States v. Ventresca*, supra, 380 U.S. 117, 85 S.Ct. 750. (Douglas, J. dissenting.)

If, rather than the proper official, it is the police or, as in this case, and in *Aguilar*, even an unidenti-

> fied third party who decides whether the facts known to him are a sufficient indication that probable cause exists for the issuance of a warrant, the amendment would be reduced 'to a nullity and leave the people's houses secure only in the discretion of police officers,' *Johnson v. United States*, supra, 333 U.S. 14, 68 S.Ct. 369."

These words could very easily have been written about the instant case.

Mr. Justice White, concurring in *Spinelli v. United States*, supra, said:

> "If the affidavit rests on hearsay—an informant's report—what is necessary under *Aguilar* is one of two things: the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it—perhaps one of the usual grounds for crediting hearsay information."

Mr. Justice White, later in the same opinion, said:

> "Neither should the warrant issue if the officer states that there is gambling equipment in a particular apartment and that his information comes from an informant, named or unnamed, since the honesty of the informant and the basis for his report are unknown. *Nor would the missing elements be completely supplied by the officer's oath that the informant has often furnished reliable information in the past.*" (Emphasis added.)

The conclusion of the officer that the informant was reliable in the past provides nothing for the magistrate to base his findings upon, least of all a substantial basis.

This Court in *United States v. Ventresca*, supra, said:

> "Hearsay may be the basis for issuance of a

search warrant as long as there is a substantial basis for crediting the hearsay."

With this holding, no fault can be found. Sub judice, the very core of the affidavit is hearsay, the report of an unnamed informer, without which there certainly could be no finding of probable cause.

> "There must be a substantial basis for issuer of warrant to conclude that an offense has been committed and where application is based on hearsay there must be a substantial basis for crediting declarant's statement, which would require issuing officer to be informed of some underlying circumstances upon which affiant has relied to conclude that information received is reliable." *United States v. Wood*, 270 F. Supp. 963.

In *Go-Bart Importing Co. v. United States*, supra, this Court held that the provisions of the Fourth Amendment prevented the issuance of a search warrant on vague, loose or doubtful facts. This, when applied to informant's reliability, requires more than a mere conclusion of past reliability.

The Court of Appeals of Georgia in holding that the affiant's affirmance of past reliability supplied probable cause rejected the words of Mr. Justice White in *Spinelli* when he said:

> "The past reliability of the informant can no more furnish probable cause for believing his current report than can previous experience with the officer himself."

In *Riggan v. Virginia*, supra, this Court reversed the Virginia court which held that the police officer's affidavit had stated probable cause by alleging personal observation and information from sources believed by the police to be reliable.

That the mere statement "furnished reliable information in the past" or "who has proven reliable in the past" is not sufficient, without more, is reflected in *Schnitzler v. Follette, Warden,* supra, which required a statement of reasons that showed the reliability of the informer; in *United States v. Bozza,* supra, holding that the constitutional requirement for the issuance of a valid search warrant is, when the application is based on a statement of a third party, a substantial basis for crediting the hearsay.

In *United States v. Vigo,* supra, the Court said:

> "The mere statement that informant is reliable is insufficient to afford magistrate with basis for finding probable cause for issuance of search warrant; there must be some reason set forth in affidavit whereby magistrate can find support for conclusion."

We are not unmindful of the "totality of circumstances" doctrine as applied to affidavits for search warrants and recognize that the Georgia Court of Appeals applied that doctrine in this case in reaching its final opinion. However, we believe as did Mr. Justice Harlan, when speaking for the majority in *Spinelli v. United States,* supra, he said:

> "We believe, however, that the 'totality of circumstances' approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause its proper weight must be determined by a more precise analysis."

Where, as here, the finding of probable cause must rest upon the hearsay report of an informer, the magistrate must be given facts upon which to base his con-

clusion of reliability. The conclusion of reliability must first be determined before the conclusion of probable cause in such circumstances. Probable cause fixes a legal standard and does not relate to verbal expression; it connotes a legal conclusion based upon the existence of facts. *United States v. Wroblewski,* 105 F.2d. 444.

To permit totality of circumstances to control where an informer's information is involved leaves the security of the people's house to the whim and caprice of the police and his informer without the very necessary buffer, the independent magistrate.

The danger of this approach can readily be seen by a review of the record in the instant case.

The police made the determination of reliability of their informer and thereby the credibility of his information. With the warrant they obtained they searched and caused to be arrested Edward O. Sams.

Upon the trial of the issues they had no facts or evidence to support their case other than their own opinion, they could not swear that Sams ever took a bet or that the contest upon which the bets were alleged to have been placed were ever played, but in their opinion, he was guilty, and, they said as much. They took the items seized and stated that in their opinion, these papers were records of a lottery and on this information Sams was convicted.

The Courts of Georgia have defined the elements of a lottery as being "consideration", "drawing" and "chance", *Arnold v. State,* 85 Ga. App. 366. and that the defendant's plea of not guilty placed the burden of proving these essential elements of the crime beyond a reasonable doubt. *Bell v. State,* 14 Ga. App. 718. Police

opinion in the instant case was substituted for fact to prove these elements.

To permit one to be searched under a warrant issued on police suspicion and an informer's tip, which the police conclude is reliable, without a showing to an independent magistrate of facts to support their conclusion, and, to thereafter be convicted on the opinion of the police that the items seized were evidence of a criminal act, smacks of a police state procedure where the magistrate and the court functions as a rubber stamp for the police.

If the Courts of Georgia are permitted to go astray from the law of the land as pronounced by the higher courts and to formulate the law contrarily thereto, the result would be to encroach upon the freedom we so jealously guard.

We acknowledge that the burden of the police in enforcing the laws and especially the anti-gambling laws is great, but they must carry that burden within the framework of the law as it exists and not by their opinion and their conclusions.

The Courts of Georgia must function independently of the police and not as an extension thereof. If this is true, then the police must be required to furnish facts, not opinions and unsupported conclusions.

CONCLUSION

We respectfully submit that the fundamental freedom from unreasonable search and seizure, which rightfully belong to the citizens of this country who may come before the courts of Georgia, is in jeopardy by the ruling of the Georgia Court of Appeals and that this Court should lend its guidance by reviewing and reversing the judgment and opinion of the Court of Appeals of Georgia.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES CONSTITUTION — IV. AMENDMENT

SEARCHES, SEIZURES, AND GENERAL WARRANTS. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

GEORGIA CONSTITUTION — ARTICLE I. PARAGRAPH XVI

SEARCHES, SEIZURES, AND WARRANTS. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath, or affirmation, particularly describing the place or places, to be searched, and the persons or things to be seized.

GEORGIA LAWS 1966, pp. 567, 568 (27-303)

GROUNDS FOR SEARCH WARRANT. Upon the written complaint of any officer of the State or its political subdivisions charged with the duty of enforcing the criminal laws under oath or affirmation which states facts sufficient to show probable cause that a crime is being committed, or has been committed, and which particularly describes the place or person, or both, to be searched and things to be seized, any judicial officer authorized to hold a court of inquiry to examine into an arrest of an offender against the penal laws, herein re-

ferred to as "judicial officer," may issue a search warrant for the seizure of the following:

(a) Any instruments, articles or things, including the private papers of any person, which are designed or intended for use, or which have been used in the commission of the offense in connection with which the warrant is issued.

(b) Any person who has been kidnapped in violation of the laws of this State, or who has been kidnapped in another and is now concealed within this State, or any human fetus or human corpse.

(c) Stolen or embezzled property.

(d) Any item, substance, object, thing or matter the possession of which is unlawful.

(e) Any item, substance, object, thing or matter, other than the private papers of any person, which are tangible evidence of the commission of the crime for which probable cause is shown: Provided, however, when the peace officer is in the process of effecting a lawful search, nothing in this section shall be construed as precluding him from discovering or seizing any stolen or embezzled property, any item, substance, object, thing or matter the possession of which is unlawful, or any item, substance, object, thing or matter other than the private papers of any person which is tangible evidence of the commission of a crime against the laws of the State of Georgia. (Acts 1966, pp. 567, 568.)

APPENDIX "B"

OPINION IN THE GEORGIA COURT OF APPEALS

44685 E. O. SAMS v. THE STATE H-68

The affidavit upon which a search warrant is issued must give the reasons for the informer's reliability and must either state how the informer obtained the information or the tip must describe the criminal activity in such detail that the magistrate may know it is more than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

The defendant appeals from his conviction on a two count accusation charging that he did "keep, maintain, and operate a . . . football lottery" and that he did "bet, wager and gamble . . . and solicited bets and wagers on the results of football games."

HALL, Judge. 1. Two of the enumerations of error are that the trial court erred in overruling the defendant's motion to suppress evidence and in subsequently admitting this evidence over objection at the trial. The evidence was obtained by a warrant which defendant claims was not supported by proper affidavit.

The text of the affidavit reads as follows: "We have received information from an informer that has proven reliable in the past on gambling and lottery information who states that he has personal knowledge that Eddie O. Sams is taking bets on ball games. The informant states that most of this betting is conducted from Eddie Sams' home located in Cobb County on Old Tritt Rd. and that Eddie Sams pays off and col-

lects monies for these bets at his service sta. on Ponce De Leon Av. on Monday mornings following the week end ball games. The informant states that Eddie Sams will have collection sheet on his person when he arrives at work on Mons. The informant also stated that some bets are handled at the ser. sta. itself and that people who gamble come and go from this location. This information has been received during the last month several times, the latest time being Dec. 17th, 1968. Subject Eddie Sams has previous arrests for this type violation and bets have been found before at this location and we have seen people known to us to be involved in betting on athletic contests at this location. For the above reasons I believe that Eddie O. Sams is violating Sec. 26.6410 at the above location."

Defendant relies on the recent case of Spinelli v. U. S., 393 U.S. 410. Here again, as in Aguilar v. Texas, 378 U. S. 108, the Supreme Court considered the sufficiency of the affidavit's facts and circumstances to show probable cause. However, the Court definitely states that it is clarifying Aguilar, not changing it. The Spinelli affidavit is found insufficient upon application of the Aguilar tests of an informer's tip. As clarified by Spinelli, these tests are: (1) that the affidavit gives reasons for the informer's reliability, and (2) that the affidavit either specifically states how the informer obtained the information *or* the tip describes the criminal activity in such detail that the magistrate may know it is more than a "casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

The Spinelli affidavit was only a bald statement that the F.B.I. "has been informed by a confidential re-

liable informant that Wm. Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephone . . ." There is a vast difference between this and the affidavit in the present case. Here, reliability is shown by a past history in similar matters. See Marshall v. State, 113 Ga. App. 143 (147 SE2d 666); Steele v. State, 118 Ga. App. 433 (164 SE2d 255). Here also the criminal activity is detailed as to times and places.

Standing alone, the sighting of known gamblers at the service station or the defendant's previous arrests on lottery charges are merely the assertion of police suspicion, and of course, insufficient for the issuance of a search warrant. On the other hand this information does not void the affidavit. It adds weight to the tip so that a magistrate, looking at the whole of the evidence, can find probable cause.

The trial court did not err in denying defendant's motion to suppress nor in admitting the evidence over defendant's objection.

2. Defendant enumerates as error the refusal of the trial court to grant a mistrial because the assistant solicitor used the following language in his argument: "We speak of organized crime, and when you do get into three basic elements of evidence: narcotics, prostitution and gambling. Generally one will tint the other. But this is the type of organized crime that has to be stopped . . ." In overruling the motion the court directed the solicitor not to go into general crime conditions. The defendant renewed his motion. We find no error. Terhune v. State, 117 Ga. App. 59 (162 SE2d 747); McKeever v. State, 118 Ga. App. 386 (163

SE2d 919); Fry v. State, 71 Ga. App. 795 (32 SE2d 410); Hunt v. State, 64 Ga. App. 324 (13 SE2d 121).

3. The evidence authorized a conviction. Hill v. State, 114 Ga. App. 527 (151 SE2d 818); Thomas v. State, 118 Ga. 774 (45 SE 622).

Judgment affirmed. Jordan, P.J., and Whitman, J. concur.

CERTIFICATE OF SERVICE

I, LeRoy C. Hobbs, attorney for petitioner, hereby certify that I have this date served a true and correct copy of the foregoing Application for Certiorari upon the State of Georgia, by personally delivering a copy of same to: Honorable Arthur Bolton, Attorney General of Georgia, State Judicial Building, Atlanta, Georgia, and, Honorable Hinson McAuliffe, Solicitor General, Fulton County Criminal Court, Fulton County Courthouse, Atlanta, Georgia.

This 21 day of May, 1970.

/s/ LEROY C. HOBBS

LeRoy C. Hobbs

LEROY C. HOBBS
Attorney for Petitioner

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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